(4)

No. 91-808

In The
Supreme Court of the United States
October Term, 1991

RITAELLEN M. MURPHY, R.N., et al.,

Petitioners,

vs.

RICHARD M. RAGSDALE, M.D., et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

AMICUS CURIAE BRIEF OF CERTAIN MEMBERS OF THE GENERAL ASSEMBLY OF THE STATE OF ILLINOIS IN SUPPORT OF PETITIONERS-APPELLANTS

(amici listed inside front cover)

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Representative Dan Cronin
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Representative DeLoris Doederlein
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(Republican)
85th Representative District

Note: The written consents to file this *amicus curiae* brief have been obtained from all of the parties and are on file in the Clerk's Office.

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* constitute a bipartisan group of Illinois legislators from both houses of the Illinois General Assembly. Although the *amici* have differing views on abortion as public policy, all of the *amici* do support the authority of state legislatures and administrative agencies to regulate outpatient surgical facilities to promote public health, to protect the safety of women undergoing abortions, and to contain the rising costs of medical care.

On April 13, 1988, the Seventh Circuit Court of Appeals in a divided opinion declared certain medical statutes and regulations unconstitutional because of the Illinois General Assembly's presumed bad "motive" (i.e., to regulate abortion). The majority ignored compelling evidence of the need for regulatory control of outpatient surgical facilities in 1973, and the need for more intensive regulation of abortion clinics discovered in 1978. Judge Coffey wrote a caustic dissent.

On July 3, 1989 the Court recognized the exceptional importance of the *Ragsdale* case and took the case on appeal. On March 22, 1990 the District Court approved a proposed settlement from which the Petitioners have appealed.

On August 20, 1990, the Seventh Circuit Court of Appeals in a divided opinion denied appellate standing to two members of the plaintiff class of women who desire or may desire an abortion some-

time in the future. The majority held that the same medical statutes and regulations were adopted by the Illinois General Assembly for another presumed bad "motive" (i.e., to limit the number of abortions by making abortions more expensive). The Court of Appeals reasoned that since the statutes were gutted, the Petitioners had no harm from which to appeal. Judge Flaum wrote a scathing dissent.

In both the 1988 and 1991 opinions the Court of Appeals ignored the actual legislative history and true motives of the Illinois General Assembly which had adopted a statutory scheme designed to limit medical costs and to assure the health and safety of Illinois citizens.

When this Court first granted certiorari in 1989 our primary concern was possible limits imposed on our constitutional authority to medically regulate abortions, thus impeding our ability both to provide for public health and safety and to curtail escalating medical costs.

However, in approving the proposed settlement the District Court directly undercut the constitutional integrity of the Illinois General Assembly. Illinois statutes were rewritten and legislative enactments which had previously been held constitutional were enjoined. By rejecting the standing of Petitioners the Court of Appeals denied to them their right under Illinois law to constitutionally challenge these void legislative enactments. To safeguard our very sovereignty we feel impelled to file this *amici curiae* brief in support of Appellants.

SUMMARY OF ARGUMENT

The central issue is state sovereignty and the constitutional integrity of the Illinois General Assembly. Under the Illinois Constitution of 1970 the Illinois General Assembly is the exclusive legislative branch of the State of Illinois. This authority to legislate cannot be delegated to any other branch of government, to any administrative agency, or to any individual.

Yet certain members of the executive branch, certain administrative agencies, and certain private individuals chose to rewrite a statutory scheme duly enacted by the Illinois General Assembly. That scheme provided in part that all abortion procedures would be performed at medically regulated sites. This express statutory enactment was rejected by the consent of the parties, and was then redrafted by them, without any constitutional authority whatsoever.

Statutory provisions were rejected by injunction which had previously been held constitutional. When these provisions were enjoined, no finding of unconstitutionality was ever made.

When the District Court approved the settlement proposal, and the newly crafted statutory scheme which the parties themselves had made up on their own, the Tenth Amendment to the United States Constitution lost all form and substance. For certainly any limits imposed by federalism have

been breached and the exclusive legislative prerogative of the Illinois General Assembly has been destroyed.

When the Court of Appeals rejected the standing of the Petitioners, any prospect of setting right the wrong imposed by the District Court was quashed. Standing was rejected by the Court of Appeals only because it once again redefined the legislative motive of the Illinois General Assembly to supposedly eliminate abortion and placed "gambits beyond the possibility of appellate correction."

As a result, Petitioners, who are members of the plaintiff class of women who desire or may desire an abortion sometime in the future, were denied standing. The Court of Appeals erroneously concluded, without so much as a scintilla of evidence from the record, that these women were ideological litigants only, and that they therefore suffered no harm when the proposed settlement "gutted" the statutes.

Issues of ideology are moot in this case, though, because no matter what the ideology of the dissenting women may be, Illinois provides by statute that abortion shall always be legal to protect the life of the mother. So whether these women desire abortion to be legal under virtually all circumstances or under limited circumstances, they still may desire an abortion to save their own lives if such a circumstance should ever arise. And in such a case, Illinois statutory law is designed to protect them against the back-alley butchers in Illinois who now have offices

on Main Street.

As the only solution, Judge Posner suggested that a collateral attack could be made by a future executive officer who would seek to enforce the statutes "in defiance of the consent decree." However, no executive officer would place himself in such a position.

When the settlement negotiations were taking place, the Cook County State's Attorney, as representative of a class consisting of the State's Attorneys of Illinois, participated only because he was ordered to do so by the District Court.

If the class representative only participated in settlement negotiations out of fear of sanctions by the District Court, how much more would an executive officer fear sanctions by defying a consent decree that the District Court approved and the Court of Appeals affirmed?

The State of Illinois is already facing a request for hundreds of thousand of dollars of attorneys' fees and costs supposedly incurred by Appellees. To approve the settlement the District Court did not hesitate to rewrite Illinois statutory law without constitutional authority. To deny appellate standing the Court of Appeals did not hesitate to redefine legislative motive without regard for either legislative intent or history.

One does not need a divining rod to know the outcome of the request for legal fees by the ACLU and

Dr. Ragsdale if this Court refuses to grant the request for certiorari. The State of Illinois will be faced with paying legal fees incurred by the opposition in negotiating an illegal and unconstitutional settlement which Judge Posner concluded that the District Court failed "to probe the adequacy of." And Judge Flaum agreed.

Finally, Judge Flaum was correct when he stated that "certain of the individuals before us can appropriately challenge that settlement." First, if legislative motive is not redefined, the class members have standing. Second, as Judge Flaum stated, class members should be able to challenge a settlement achieved by improper procedures regardless. Third, Illinois law permits any person to challenge void statutory enactments such as the newly created statutory scheme adopted by the District Court. Fourth, unborn children as persons under Illinois law have constitutionally based standing. But any standing exists only if this Court grants certiorari and holds that standing does exist.

ARGUMENT

I. THE AMBULATORY SURGICAL TREATMENT CENTER ACT WAS ENACTED IN 1973 TO PROMOTE PUBLIC HEALTH AND SAFETY THROUGH THE REGULATION OF COST-EFFECTIVE OUT-PATIENT SURGICAL TREATMENT CENTERS.

A. AMBULATORY SURGICAL TREATMENT CENTERS ORIGINATED OVER 20 YEARS AGO.

What had begun as a free-standing "Surgicenter" in 1970 had within a few short years become a national trend toward ambulatory surgical treatment centers. As commentator L. Burns noted:

> The success of the (first "Surgicenter") precipitated rapid growth of *a new type of facility for the delivery of ambulatory surgery, the free-standing, independent, ambulatory surgery center.* Since that time, the Surgicenter has become a model for an increasing number of both independent and hospital-sponsored free-standing ambulatory surgery programs. According to the Freestanding Ambulatory Surgical Association (FASA), there are approely 125 independent free-standing ambulatory surgery centers, 96 of which are members of FASA. According to FASA, which has been keeping statistics on its members since 1974, the membership performed 94,499 ambulatory surgery procedures in 1981, an increase of 6 percent over the number performed in 1980. This figure can be compared to 3.2 million ambulatory surgical procedures performed by hospitals offering ambulatory surgery in 1980.

L. Burns, *Ambulatory Surgery, Developing and Managing Successful Programs*, pp. 11-12 (1984). See

also D. Ermann and J. Gabel, *The Changing Face of American Health Care, Multi-Hospital System, Emergency Centers, and Surgery Centers*, 23 Medical Care 401, 406 (May 1985).

B. THE IMPETUS BEHIND THE RAPID DEVELOPMENT OF AMBULATORY SURGICAL TREATMENT CENTERS HAS BEEN TO MAKE OUT-PATIENT SURGERY COST-EFFECTIVE.

As a practical matter, ambulatory surgical centers have historically been the solution to cost-effective and safe day surgery. As T. O'Donovan observed in his treatise on ambulatory centers:

> From a societal point of view, perhaps *the greatest impetus behind the ambulatory surgery concept is its potential for reducing the cost of services.* This potential applies to both freestanding and hospital-based facilities, the two major prototypes for ambulatory surgery. By eliminating overnight hospital stays, expenditures for hospital services...may be reduced directly and dramatically...By focusing on reducing inpatient surgery...ambulatory surgery may further reduce costs. (emphasis supplied).

T. O'Donovan, *Ambulatory Surgical Centers, Development and Management*, p. 143 (1976).

C. THE AMBULATORY SURGICAL TREATMENT CENTER ACT WAS

DRAFTED BY A POLITICAL CROSS-SPECTRUM OF ILLINOIS MEDICAL ORGANIZATIONS.

The Ambulatory Surgical Treatment Center Act was created by Senate Bill 1051, which was sponsored by Senator Wooten. Legislative Synopsis and Digest, 1973 Sess. 78th Ill. Gen. Assem. at 508. The bill was drafted by the Illinois State Medical Society, which supports legalized abortion, the Illinois Hospital Association and the Illinois Department of Public Health. 78th Ill. Gen. Assem. Senate Proceedings, May 29, 1973, at 26; House Proceedings, July 1, 1973, at 106.

D. THE LEGISLATIVE HISTORY DEMONSTRATES A STRONG LEGISLATIVE CONCERN FOR REDUCING SURGICAL COST AND PROVIDING FOR PUBLIC HEALTH AND SAFETY.

Senator Wooten explained the purpose of the bill on the Senate floor:

> (Senate Bill 1051) has to do with the ambulatory-surgical treatment center, which is a center for the performance of minor surgery that does not require an overnight stay. *This...is an attempt to attack the very problem alluded to by Senator Sours, the tremendous expense of a hospital stay. Such centers are not limited to abortions. They can do all sorts of minor surgery.* (emphasis supplied).

Senate Proceedings, May 29, 1973, at 33-34. Later in the debate, Senator Wooten stated that:

> *While this has a relation to abortion, it actually goes much beyond that. It (S.B. 1051) provides for the establishment and licensing of facilities which can perform minor surgery.* This would be things like tonsillectomy, hernias, abortions would be included, facial surgery, plastic surgery and so on. In other words procedures which would not require an overnight stay. And indeed these ambulatory surgical treatment centers are forbidden to keep patients overnight. However, those of you who have kept close to medical practices know that untoward things can occur at any time, and so provision is made in here that *doctors who function in such a center must also be licensed to practice in a hospital nearby so that if any complications occur they can quickly move the patient to that place.* Now, I handed out an outline to explain to you how these things would work, definitions, they must get a license, some of these are left open as to regulations. The Department would like to take a hand in that. *This is something doctors have been urging us to do for a couple of years now, and ambulatory surgical treatment centers are...in effect out west. The idea is that they can be a great savings to a patient.* One of the big costs in a hospital, if you remember it's kind of like a hotel which has special services and if you don't need that overnight stay, you

> can save a great deal of money. So there's a great savings possible for the patient who needs this kind of one-day surgical treatment. *It does include abortion, and everything would be rather closely regulated and inspected.* (emphasis added).

Senate Proceedings, June 1, 1973, at 43. Another state senator further pointed out that :

> This bill is a good bill. It's not related in any way to abortions. It's sponsored by the Medical Association. There's nothing wrong with ambulatory medical services.

Comments of Senator Knuppel, Senate Proceedings, June 1, 1973, at 44.

Responding to Senator Ozinga's accusation that the bill would make abortions easier to obtain, Senator Wooten stated that "*the main thrust of this is to try to save some money by getting minor surgical treatment out of the hospital where it is hideously expensive and into a clinic.*" (emphasis added). Senate Proceedings, June 1, 1973, at 45.

The Senate approved the bill on a vote of 30 to 6, one member voting present. Illinois Senate Journal (1973) at 1531.

The bill was then taken up by the House of Representatives. The House sponsor, Representative Day, spoke in support of the bill:

> Now the last Bill...licenses Ambulatory Surgical Treatment Centers....*(T)his Bill is not limited to the matter of abortions, but it would include such things as (o)ral (s)urgery or very minor operations or stitching in case someone needs a few stitches and it fairly sets up stringent regulations for the licensing of these facilities.* It provides that they must be operated under the medical supervision of a physician and that if surgery is performed by a doctor, it must be by a doctor who can admit a patient to a hospital if complications arise. *(Senate bill 1051) (c)ontains very strict regulations for the licensing of these Ambulatory Surgical Treatment Centers.* (emphasis supplied).

House Proceedings, July 1, 1973, at 107. Immediately before the final vote in the House, Representative B.B. Wolfe spoke in favor of Senate Bills 1049, 1050 and 1051:

> *(A)n editorial (in the Chicago Sun Times)...said, "(W)e urge House Members, many of whom are violently opposed to... legislation on abortion to view the measures not as pro-abortion Bills but as public health measures.(") That is what they are and they should be approved as such* and I heartily endorse this package because it is the only one in the State of Illinois to carry out quality medicine in this area.

House Proceedings, July 1, 1973, at 110.

The House of Representatives approved Senate Bill 1051 on a vote of 111 to 14, twenty-four members voting present. Illinois House Journal (1973) at 5034-35.

The bipartisan support for this bill in both the Senate and the House of Representatives was overwhelming.

E. THE EXPRESS LEGISLATIVE INTENT OF THE AMBULATORY SURGICAL TREATMENT CENTER ACT IS TO PROTECT PUBLIC HEALTH.

The text of the statute which specifies with clarity the intent of the Illinois General Assembly in enacting the Ambulatory Surgical Treatment Center Act:

> It is declared to be the public policy that the State has a legitimate interest in assuring that all medical procedures, including abortions, are performed under circumstances that insure maximum safety. Therefore, the *purpose of this Act is to provide for the better protection of the public health* through the development, establishment, and enforcement of standards (1) for the care of individuals in ambulatory surgical treatment centers, and (2) for the construction, maintenance and operation of ambulatory surgical treatment centers, which, in light of advancing knowledge, will promote safe and adequate treatment of such individuals in

ambulatory surgical treatment centers. (emphasis supplied).

Ill.Rev.Stat., ch. 111 1/2, par. 157-8.2.

II. IGNORING THE NATIONAL DEVELOPMENT OF OUT-PATIENT SURGICAL CENTERS, THE ILLINOIS LEGISLATIVE HISTORY AND THE EXPRESS PURPOSE OF THE STATUTE, THE COURT OF APPEALS ERRONEOUSLY REDEFINED LEGISLATIVE MOTIVE.

A. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE STATUTE WAS PASSED TO LIMIT THE NUMBER OF ABORTIONS BY MAKING ABORTIONS MORE EXPENSIVE.

Although Judge Posner aptly noted in his treatise on the federal courts that "a court should adhere to the enacting legislature's purposes," this is precisely what the majority failed to do in the instant case. Posner, *The Federal Courts*, p. 279 (1985). Judge Posner, in violation of his own writings, joined Judge Fairchild in creating a new judicially created legislative intent stated that:

> The consent decree guts a statute that was (to speak realistically) designed to limit the number of abortions performed in Illinois by making abortion more expensive. Judge Posner's concurring opinion at A-10.

B. THE COURT OF APPEALS IGNORED

THE TESTIMONY AND EVIDENCE PRESENTED IN THE RAGSDALE CASE.

The majority did not focus on how the enforcement of the Ambulatory Surgical Treatment Center Act actually effected health care costs. We agree with Judge Coffey that any increase in costs would be *de minimus*:

> The record reveals that Dr. Ragsdale testified that he estimated the added costs of complying withe the regulations *over and above the costs required simply to relocate his current practice in such a manner as he deemed appropriate for his needs*, as $25.21 per patient. (Ragsdale Tr., 400-401). This added costs of $25.21 certainly cannot be considered as significantly more than the $19.40 (less than a $5 difference) increase per abortion for tissue examination upheld by the Supreme Court in *Ashcroft* because "in light of the substantial benefits that a pathologist's examination can have, this small cost is clearly justified." 462 U.S. at 490, 103 S.Ct. at 2524. Moreover, it should be pointed out that the increased cost testified to herein, unlike the one in *Ashcroft*, would at best only be temporary and not one that would remain ad infinitum. Dr. Ragsdale admitted that "much of the debt would be retired after two to five years." Thus, after two years the fee increase would be reduce to $10.90 per patient, and after five years to

> a mere $3.40 per patient. I am convinced that the minimal engineering and construction design requirements allegedly at issue, which ensure only that all surgical procedures performed in ASTC's, including first-trimester abortions, are performed in clean, sanitary, and safe structures are a substantial benefit to the health and safety of patients, and the minuscule financial impact referred to is clearly *de minimus* and justified.

Ragsdale v. Turnock, 841 F.2d 1358, 1392 (7th Cir. 1988) (Coffey, J., dissenting).

Although a *de minimus* cost increase of a few dollars resulted within ambulatory surgical treatment centers, the resulting savings from performing these surgeries on an out-patient rather than in-patient basis was substantial. Judge Coffey clearly pointed out how the savings is achieved by having these proceedures no longer performed in hospitals:

> Plaintiff's counsel stated during closing argument before the district court that the fee charged in a hospital for an abortion was $1,000 and that the hospital fee was 2.5 to 4 times greater than the cost of an abortion performed in an outpatient facility (including a physician's office). Thus according to plaintiff's counsel, an outpatient abortion costs $250 to $400.

Ragsdale v. Turnock, 841 F.2d 1358, 1392 (7th Cir.

1988) (Coffey, J., dissenting).

C. THE DE MINIMUS COST INCREASES WERE FURTHER JUSTIFIED BY HORRENDOUS MEDICAL PRACTICES AT ABORTION CLINICS.

After a five-month investigation, the Chicago Sun-Times and the Better Government Association published a series of articles entitled, "The Abortion Profiteers," in November, 1978, which disclosed that at least twelve women had died following abortions in Chicago abortion clinics; that abortions were performed under unsterile conditions on women who were not pregnant, with or without anesthesia; that patients were forced to leave the recovery room prematurely; that medical records were falsified; and that kickbacks were paid for abortion referrals.

In response to these conditions, we had to regulate abortion practices in Illinois. Through our duly enacted statutory scheme we would have been able to halt these practices with a *de minimus* cost of a few dollars. We believe now, as we did then, that the health and safety, the very lives of Illinois women are worth far more than$3.40 per patient procedure.

D. IN THE INTERESTS OF JUSTICE THE COURT SHOULD RECOGNIZE THE STANDING OF PETITIONERS.

Our only hope and the hope of Illinois women is that this Court will recognize that we did not enact this statutory scheme to make abortions more ex-

pensive. For the lone remaining protectors of our exclusive legislative sovereignty and the health and very lives of Illinois women are the Petitioners-Appellants whose standing is unquestionable.

III. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION.

A. SECTION ONE OF THE ABORTION ACT HAS BEEN HELD CONSTITUTIONAL

Federal appellate and district courts have repeatedly found Section One of the Illinois Abortion Act of 1975, which establishes the personhood of unborn children and proscribes abortion except to save the life of the mother, to be constitutional; for Section One also provides that these Provisions become operative only if Roe is ever modified or overruled. No constitutional infirmity of any kind has ever been found in Section One. See Ill.Rev.Stat., ch. 38, sec. 81-21.

Section One was initially attacked on the grounds that it was "the product of an impermissible state purpose, to discourage and frustrate a woman's right to an abortion in every case." *Wynn v. Scott*, 449 F.Supp. 1302, 1314 (N.D.Ill. 1978). This argument was rejected on the grounds that Section One "states that the intention of the General Assembly is to reasonably regulate abortions in conformity with Supreme Court decision." *Id.*

The Court of Appeals affirmed, *Wynn v. Carey*,

599 F.2d 193 (7th Cir. 1979). Illinois recognizes that federal courts have left Section One undisturbed. *Wilczynski v. Goodman*, 391 N.E.2d 479, 73 Ill.App.3d 51 (1979).

Not to be discouraged, opponents of Section One tried again. The Court of Appeals rejected their arguments once again, saying that Section One, read as a whole, does not express an unlawful purpose. *Charles v. Carey*, 627 F.2d 772, 779 (7th Cir.1980).

Three years later they took another bite at the apple. The District Court rejected them outright, stating simply, "Section One shall not be permanently enjoined." *Charles v. Carey*, 579 F.Supp. 464 (N.D.Ill. 1983).

This Court has twice taken note of these proceedings. *Carey v. Wynn*, 439 U.S. 8 (1978); *Diamond v. Charles*, 476 U.S. 54 (1986).

We are left wondering, then, how it is that a federal court could have jurisdiction to effectively enjoin a state legislative act which has never been found to violate any provision of federal law. Such an act by the District Court in this case assumes the existence of a general power to grant injunctive relief in the federal courts instead of limited injunctive powers dependent upon some provision of federal law allowing for such relief.

B. THIS COURT HAS RECOGNIZED STANDING IN FEDERAL COURT

BASED UPON RIGHTS CONFERRED BY STATE LAW.

As this Court has said, the Illinois General Assembly "has the power to create new interests, the invasion of which may confer standing." *Diamond v. Charles*, 476 U.S. 54, 65 n. 17 (1986). We created those very rights in unborn children in Section One. By provision of Section One, those rights became operative when this Court's recent decisions modified *Roe*. It was reversible error for the Court of Appeals and the District Court not to recognize this.

As legislators, we need the clarity that only the Court can provide us with to define our legislative authority in this period of judicial uncertainty.

CONCLUSION

For the foregoing reasons, we ask this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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